
In the Matter of the Compensation of
KILIE M. MILLER, Claimant
WCB Case No. 00-05005
ORDER ON REVIEW
Mustafa T Kasubhai PC, Claimant Attorneys
Michael G Bostwick LLC, Defense Attorneys

Reviewing Panel: Members Lowell, Langer, Bock, Phillips Polich, and Biehl.¹ Members Philips Polich and Biehl concur in part and dissent in part.

Claimant requests review of Administrative Law Judge (ALJ) Mongrain's order that dismissed her request for hearing for failure to perfect an aggravation claim. On review, the issue is aggravation. We reinstate claimant's hearing request and find the aggravation claim not compensable.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," but not the "Ultimate Finding of Fact."

CONCLUSIONS OF LAW AND OPINION

The ALJ dismissed claimant's hearing request from an alleged "de facto" denial of an aggravation claim. The ALJ reasoned that the aggravation claim form required under ORS 656.273(3) was not accompanied by an attending physician's report establishing by written medical evidence supported by objective findings that claimant had suffered a worsened condition attributable to the compensable injury.

Specifically, the ALJ reasoned that the attending physician's (Dr. Laubengayer's) chart note that accompanied the aggravation claim form referenced increasing problems from an arthritic knee, but did not directly or indirectly state that the worsened condition was attributable to claimant's compensable conditions. Therefore, the ALJ determined that there was no perfected aggravation claim and, accordingly, that the self-insured employer was

¹ On June 7, 2002, pursuant to a notice of public meeting, the Board decided to sit together as a panel of five to review a designated group of cases. This case was one of that limited group. Although reviewed by all members, this case does not involve an issue of first impression that has a profound impact on the workers' compensation system.

under no duty to accept or deny the claim. Because there was no “de facto” denial and because that was the issue raised by claimant’s hearing request, the ALJ further determined that claimant’s hearing request should be dismissed.

On review, claimant requests that the case be remanded to the ALJ for a determination of the aggravation claim on the merits. Specifically, claimant contends she perfected an aggravation claim. Claimant asserts that, because the ALJ referred to her current right knee condition as an “arthritic knee” when there was no explicit diagnosis of that in Dr. Laubengayer’s chart note, the ALJ improperly reviewed other documents in determining the validity of the aggravation claim. According to claimant, the ALJ could only review the accompanying chart note in making his determination of whether an aggravation claim was perfected. We agree.

In *Stapleton v. Liberty Northwest Ins. Corp.*, 175 Or App 618 (2001), the court explained that, for an aggravation claim to be perfected, ORS 656.273 requires a claimant to contact the insurer in a timely manner, to provide the insurer with the proper aggravation claim form, and to include with the claim form a physician's report that establishes "by written medical evidence supported by objective findings that the claimant has suffered a worsening condition attributable to the compensable injury." ORS 656.273(3). On remand in *Stapleton*, we found that, in determining whether an aggravation claim is perfected, we look to only the aggravation claim form and the accompanying physician’s report. *Mark D. Stapleton*, 54 Van Natta 455, 460 n. 2 (2002).

The critical issue in this case is whether the written medical evidence was sufficient to establish that claimant had suffered a worsened condition “attributable to the compensable injury” pursuant to ORS 656.273(3). Claimant had originally injured her right knee in October 1994, a claim that was accepted for a right knee contusion and strain, repair of the right retinaculum and a lateral meniscus tear. Dr. Laubengayer performed surgeries on the right knee in 1995 and in 1997. The claim was most recently closed in January 1998 by a Notice of Closure that awarded 19 percent scheduled permanent disability for the right knee, an award that was increased to 26 percent in April 1998 by an Order on Reconsideration.

Dr. Laubengayer’s October 14, 1999 chart note accompanying the aggravation claim form stated that claimant had a “significant change and worsening of the right knee condition.” (Ex. 33). Moreover, Dr. Laubengayer’s chart note states that there had been “significant changes in the patellofemoral joint

and increase in the ridging of the medial femoral condyle over the last 2 ½ years.”
Id.

After reviewing this chart note, we are persuaded that it describes a worsened condition attributable to the compensable injury such that the aggravation claim was perfected. Accordingly, we agree with claimant that the medical evidence accompanying the aggravation claim form establishes that, for purposes of putting the employer on notice of an aggravation claim, claimant has suffered a worsened condition attributable to the compensable injury.² Because of this, we disagree with the ALJ’s determination that claimant failed to perfect an aggravation claim.

Accordingly, we reinstate claimant's hearing request insofar as it relates to the aggravation claim.³ Claimant has requested remand to the ALJ for a determination of the merits of the aggravation claim. However, we find that the record is sufficiently developed to determine the merits of the aggravation claim. *See* ORS 656.295(5).⁴

ORS 656.273(1) provides that a worsened condition resulting from the original injury is established by medical evidence of an actual worsening of the compensable condition. *SAIF v. Walker*, 330 Or 102 (2000). ORS 656.273(1) requires proof of two specific elements in order to establish a worsened condition: (1) "actual worsening" and (2) a compensable condition. *Gloria T. Olson*, 47 Van Natta 2348, 2350 (1995).

Here, we conclude that claimant failed to prove a compensable aggravation claim. Dr. Schilperoort, an examining physician, opined that claimant’s accepted right knee conditions had not materially worsened. (Ex. 40-9). In so concluding,

² As we noted in *Stapleton*, claimant does not have to “win” the aggravation claim in order to perfect a claim. *Stapleton*, 54 Van Natta at 460. With this in mind, we are persuaded that the aggravation claim was perfected in accordance with the standard articulated in *Stapleton*.

³ Had we found that an aggravation claim was not “perfected,” the proper procedure for the ALJ would not have been to dismiss the hearing request, but rather to deny the relief requested by claimant. In this regard, we observe that a claimant is entitled to request a hearing on a matter concerning a claim. ORS 656.283(1). Because the issue concerning the employer’s failure to process the alleged aggravation claim was just such a matter, claimant was within her rights to request a hearing on the issue.

⁴ Claimant requested remand for the ALJ to issue an order on the merits. However, neither party asserts, nor do we find, that the record as presently developed is insufficient to resolve the question of whether claimant has established a compensable aggravation claim.

Dr. Schilperoort identified preexisting degenerative joint disease as the primary factor in claimant's current right knee condition. Specifically, Dr. Schilperoort noted that there was no appreciable difference in degenerative changes on the uninjured left side and the injured right side. (Ex. 40-7). Dr. Balme, the current surgeon, concurred with Dr. Schilperoort's opinion. (Ex. 45-1).

Dr. Laubengayer provides the contrary medical opinion. As discussed above, he opined that there had been significant changes in the patellofemoral joint and an increase in the ridging of the medial femoral condyle over the past two and one-half years and that claimant was suffering from a worsening of the right knee directly and in major part caused by the original compensable 1994 injury. According to Dr. Laubengayer, the original injury caused both patellar and cartilage damage that accelerated degenerative changes and caused arthritic conditions in claimant's knee. Further, Dr. Laubengayer disagreed with Dr. Schilperoort's opinion.

Dr. Laubengayer stated that Dr. Schilperoort did not account for the trauma and damage to the knee inflicted by the compensable 1994 injury that had brought on claimant's worsened knee condition. Dr. Laubengayer noted that he has been involved in claimant's treatment since 1994 and that he based his opinion on extensive experience in orthopedic surgery. Dr. Laubengayer believed that claimant had suffered an "actual worsening" of her original injury related in major part to the original injury. (Ex. 50).

When confronted with conflicting medical opinions, we give greater weight to those opinions that are well reasoned. *See Somers v. SAIF*, 77 Or App 259, 263 (1986). In this case, Dr. Laubengayer does not rebut Dr. Schilperoort's opinion that the degenerative changes are the same in both knees. Because we find Dr. Schilperoort's opinion based on the lack of significant difference between the amount of degeneration in left and right knees persuasive, and because we are not persuaded that Dr. Laubengayer sufficiently rebutted this aspect of Dr. Schilperoort's report, we are unable to conclude that the compensable 1994 injury has "actually worsened." Accordingly, we find that claimant failed to prove a compensable aggravation claim under ORS 656.273(1).

ORDER

The ALJ's order dated August 1, 2001 is reversed. Claimant's hearing request is reinstated. The employer's aggravation denial is upheld.

Entered at Salem, Oregon on September 25, 2002

Members Biehl and Phillips Polich concurring in part and dissenting in part.

We agree with that portion of the majority's order that finds that claimant perfected an aggravation claim. However, contrary to the majority, we find that claimant has proven her aggravation claim, based on the medical opinion of Dr. Laubengayer, claimant's attending physician.

In March 2001, Dr. Laubengayer opined that there had been significant changes in the patellofemoral joint and an increase in the ridging of the medical femoral condyle over the past two and one-half years and that claimant was suffering from a worsening of the right knee directly and in major part caused by the original compensable 1994 injury. According to Dr. Laubengayer, the original injury caused both patellar and cartilage damage that accelerated degenerative changes and caused arthritic conditions in claimant's knee. Further, Dr. Laubengayer disagreed with the medical opinion of an examining physician, Dr. Schilperoort, who attributed claimant's knee condition to preexisting degenerative changes.

Dr. Laubengayer explained that Dr. Schilperoort did not account for the trauma and damage to the knee inflicted by the compensable 1994 injury that had brought on the worsening of claimant's condition when the aggravation claim was filed. Dr. Laubengayer noted that he had been involved in claimant's treatment since 1994 and that he based his opinion on extensive experience in orthopedic surgery. Dr. Laubengayer concluded his report by confirming that claimant had suffered an "actual worsening" of her original injury related in major part to the original injury. (Ex. 50).

As a general rule, we give greater weight to the medical opinion of the attending physician, absent persuasive reasons to do otherwise. *See Weiland v. SAIF*, 64 Or App 810 (1983); *Darwin B. Lederer*, 53 Van Natta 974 (2001) (discussing impact of *Dillon v. Whirlpool Corp.*, 172 Or App 484 (2001) on the general policy of deferring to the attending physician's opinion). Here, we do not

find persuasive reasons to do otherwise in light of Dr. Laubengayer's long-term familiarity with claimant's condition, his expertise and the quality of his analysis of claimant's current knee condition.

We recognize that Dr. Schilperoort reached a different conclusion from Dr. Laubengayer and instead opined that he could not identify "any objective evidence" of a material worsening of claimant's right knee conditions. (Ex. 40-9). However, Dr. Schilperoort's opinion lacks explanation and he lacks Dr. Laubengayer's familiarity with claimant's condition. Another attending physician, Dr. Balme, concurred with Dr. Schilperoort's opinion (Ex. 45). However, Dr. Balme had previously indicated an unwillingness to express an opinion in this matter, even though he found it difficult to state that all of claimant's present problems were related to the compensable 1994 injury. (Ex. 43). Considering the tentative nature of his narrative report and the fact that his concurrence with Dr. Schilperoort's opinion was unexplained, we do not find Dr. Balme's opinion persuasive.

Accordingly, we would conclude that claimant has proved an "actual worsening" of her compensable right knee condition within the meaning of ORS 656.273(1). Thus, we would find that her aggravation claim is compensable. Because the majority concludes otherwise, we dissent from that part of the majority's opinion that finds the aggravation claim not compensable.